(3)

No. 91-473

In The

Supreme Court of the United States

October Term, 1991

GULF STATES UTILITIES COMPANY,

Petitioner,

versus

LOUISIANA PUBLIC SERVICE COMMISSION, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Louisiana

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ROBERT L. RIEGER, JR.
General Counsel
Louisiana Public Service Commission
Post Office Box 91154
Baton Rouge, Louisiana 70821
Telephone: (504) 342-9888

MICHAEL R. FONTHAM*
PAUL L. ZIMMERING
NOEL J. DARCE
STONE, PIGMAN, WALTHER, WITTMANN & HUTCHINSON
546 Carondelet Street
New Orleans, Louisiana 70130
Telephone: (504) 581-3200

Attorneys for the Louisiana Public Service Commission

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

When a regulatory Commission in a rate proceeding uses a procedure in which the applicant, a utility, is informed of the issues raised by consultants of the Commission, is allowed to present evidence on the issues, receives the recommendations of the consultants, is permitted to cross-examine the consultants and present evidence to rebut the recommendations, is allowed to make formal written and oral presentations to the Commission, and is granted private audiences with individual Commissioners to address the issues, does due process require that the Commission also obtain a report from the hearing officer who presides over the taking of evidence?

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STATEMENT OF THE CASE

1. Introduction. Gulf States Utilities Company ("Gulf States" or "the company"), petitioner, seeks review of a decision of the Louisiana Supreme Court, holding that the procedure employed by the Louisiana Public Service Commission ("the Commission") in establishing rates for the company's River Bend nuclear plant ("River Bend") did not violate due process. Specifically, Gulf States argues that although it was apprised of the issues, presented evidence on the issues, received evidence from the Commission's consultants, cross-examined these consultants in a trial-like proceeding, addressed the Commission in a formal oral argument, and met privately prior to the decision with the individual Commissioners to discuss the evidence and the company's proposals, the Commission's procedures were not sufficient to provide due process to the utility. The company contends that due process also requires the preparation of a recommended decision by a hearing examiner. [Petition For A Writ Of Certiorari ("Pet.") at 3].

As noted by the Louisiana Supreme Court, which affirmed the due process ruling of the Nineteenth Judicial District Court ("district court"), the procedure here was "typical of the procedure used by the Commission in all major rate cases, including the last six rate cases filed by Gulf States." [Appendix To Petition For A Writ Of Certiorari ("App.") 22a]. In major rate cases, after the utility files a rate application, consultants and counsel are employed to assist the Commission in setting reasonable rates. The consultants perform an investigation and counsel examines the utility's witnesses in hearings conducted

by a hearing examiner. Thereafter, the Commission's consultants prepare a report in the form of testimony, which is filed, and are subject to cross-examination by the utility's counsel concerning their findings.

Although the evidence is taken before a hearing examiner, he does not prepare a recommended decision. The consultants, the utility and other parties may communicate with the decisionmakers. In this case Gulf States met privately with individual Commissioners to discuss the issues and present its proposals. A full day was set aside in which the parties made extensive formal presentations to the full Commission.

The Commission adopted the advice of its consultants regarding the ratemaking disallowance for River Bend. The Report of Special Counsel, which reflected the testimony of the Commission's chief consultants, was used in the preparation of the Majority Opinion after the Commission's rate order was issued. [App. 261a; 210a; 256a]. The order determined that $1.4 billion of the company's $3 billion investment in River Bend was imprudent and disallowed the Louisiana portion of the imprudent investment from the rate base. [App. 257a; 9a-10a].

The disallowance was more favorable to the utility than that proposed by the Louisiana Attorney General; his proposed disallowance exceeded $2 billion. [App. 51a; 168a-169a]. Indeed, the consultants limited the proposed disallowance to $1.4 billion to preserve the financial integrity of the utility, although their own analysis indicated that $2 billion in imprudent costs were incurred. [App. 37a; 50a-51a].

The consultants recommended a phase-in plan and a first year rate increase of $92 million. The Commission

granted $63 million, which was increased to $92 million pursuant to an injunction issued by the district court, relying on the consultants' recommendation. The injunction was reversed in part by the Louisiana Supreme Court. Subsequently, the Commission adopted the consultants' recommendations favoring phase-in rate increases of $38 million in 1989, $28 million in 1990, and $17 million in 1991. [Order No. U-17282-E, App. at 174a-182a; Order No. U-17282-H; Order No. U-17282-J]. Gulf States appealed only minor aspects of two of these rate orders, and did not appeal the third.

2. The Commission's traditional ratemaking procedure. Ratemaking traditionally has been viewed as a legislative process in Louisiana, just as it is in other jurisdictions. *See, e.g., McNeely v. Town of Vidalia*, 102 So. 422, 424 (La. 1924); *South Central Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n*, 352 So.2d 964, 969 (La. 1977), *cert. denied*, 437 U.S. 911 (1978); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908). Typically, the utility files an *ex parte* application for a rate increase. Notice of the application is published, and interested parties may intervene, but the thousands of consumers who will be affected by the proceeding are not joined as parties. *See* La. Const. Art. 4, §21(D). Regardless of the facts and law that form the basis for the ultimate ruling, the Commission usually fashions a ratemaking decision that affects thousands of persons who do not directly participate in the proceeding.

In relatively simple cases, the Commission often appoints a hearing examiner to hear the evidence and prepare a recommendation. *See, e.g., Radiofone, Inc. v. Louisiana Pub. Serv. Comm'n*, 573 So.2d 460 (La. 1991). The

utility and any intervenors present evidence and cross-examine witnesses before the examiner, who may also question witnesses. Other than the participation of the examiner, there is rarely any appearance by the Commission Staff, which has insufficient funding to hire more than one or two full-time ratemaking experts.

The examiner's recommendation is not filed as testimony, nor is the examiner subject to cross-examination regarding the basis for the recommendation. Parties may communicate with Commissioners prior to a decision, which occurs at the Commission's monthly business meeting. Commissioners receive the examiner's recommendation prior to the meeting and may seek advice from the examiner. The examiner's recommendation is reported again at the meeting, after which a vote occurs. The parties are not necessarily accorded the opportunity to address the Commission at the meeting.

In major rate cases and other complex proceedings, the examiner does not prepare a recommendation. The Commission usually retains outside consultants to perform a thorough analysis of the issues. Pursuant to Louisiana law, the Commission is authorized to employ outside rate consultants and attorneys to "evaluat[e]" and "revie[w]" rate applications and "assist the commission" in examining the utility's affairs. La. R.S. 45:1163.3. The consultants and counsel review the evidence supporting the utility's filing, conduct discovery, and examine the utility's witnesses in hearings before the examiner, which are often attended by members of the Commission or their representatives. Thereafter, the consultants make recommendations to the Commission regarding the application. In this respect, the Commission's procedure is much like the process in a majority of jurisdictions where

the agency staff performs both advocacy and advisory functions. [Edison Elec. Inst. Legal Committee Survey: Role of Commission Staff (1989) (Appendix to Brief Of Respondents In Opposition to Petition For A Writ Of Certiorari ("Resp. App.") 1a)].

In the past, the consultants did not necessarily file testimony or submit to cross-examination. For example, in a landmark *South Central Bell* case in 1976, the Commission based its decision on evidence developed through cross-examination of the utility's witnesses; the consultants advised the Commission privately. *See South Central Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n*, 352 So.2d 964 (La. 1977), *cert. denied*, 437 U.S. 911 (1978). More recently, in an effort to ensure a full airing of the issues, the consultants' recommendations have been made in the form of testimony. This testimony is filed in the record and is subject to cross-examination by the utility and other parties. The consultants' recommendations often are modified in this process.

Subsequent to the hearings, the ultimate recommendations are submitted to the Commission in a report of special counsel; the report is provided to all parties. No separate report is submitted by the hearing examiner. The parties may address written comments to the Commissioners and may seek private audiences to discuss the recommendations. The Commission sometimes hears oral argument concerning the recommendations at its business meeting. Often the Commission's order does not reflect the recommendations contained in the report of special counsel.

3. Procedure in this case. Because of the significance of the River Bend case, steps were taken to ensure a complete examination of the issues. The Commission employed three consulting firms to conduct the prudence review and two law firms to participate in the proceedings. [*See* App. 231a; 313a]. Special steps were taken to keep the Commissioners fully apprised of the evidence and the parties' positions.

The lead consulting firm was Kennedy and Associates, a "firm of experts with considerable experience in prudence evaluations of public utility requests for rate increases." [App. 137a (district court finding)]. Kennedy and Associates conducted an investigation of the company's load forecasting and generation planning relating to River Bend. This review included an evaluation of Gulf States' planning documents, interviews with company personnel, and an evaluation of contemporaneous data in the industry. [App. 232a]. In addition, Gulf States' witnesses were examined concerning their testimony, which supported the inclusion of River Bend in the rate base. On the basis of all this information, the consultants prepared recommendations in the form of testimony, submitted to discovery, and were cross-examined on their findings.

One of the Commissioners, Louis Lambert, sat as an additional hearing examiner when many of the witnesses were examined. Administrative aides of other Commissioners also attended many of the hearings. Summaries of testimony were prepared by the Commission's special counsel, submitted to Gulf States for review, and forwarded to the Commissioners when the company did not object. Further, in an unusual procedure, the Commission

set aside a full day to hear oral argument from the parties. Gulf States was permitted all the time it desired for argument and, contrary to the company's contention, was not denied the right to address any issue. In addition, the company was permitted to file written exceptions to the report of special counsel. [App. 17a-18a; 21a-22a; tr. 11/10/87 at 167-176 (Resp. App. 14a-26a)].

Gulf States was also granted private audiences with Commissioners to address the issues. In these private meetings the company unveiled its so-called "inventory" proposal, which had not been the subject of evidentiary hearings. At the oral argument, the Commission directed its consultants to study the proposal. [Tr. 11/10/87 at 170, 187-190 (Resp. App. 18a; 26a-30a)].

In the course of the entire proceeding before the Commission, Gulf States never objected that the Commission's procedure violated due process. The purported "objection" noted in the company's petition was *not* an objection to the procedure, nor to the consultants' submission of recommendations, but an admonishment that there should be no *ex parte* contacts between special counsel and the Commissioners. [Pet. at 7 n.11; tr. 10/6/87 at 23-24 (Resp. App. 31a-32a)]. The statement was made at the close of hearings. Gulf States has never alleged that there was such an *ex parte* contact after that point and, of course, the company engaged in *ex parte* contacts before and after that statement. Indeed, Gulf States was happy to ignore the limitations applicable to adjudicative proceedings, choosing to attack the Commission's procedure only after its actions proved unsuccessful. [*See* App. 21a].

The district court concluded that Gulf States was accorded due process. It found:

> Regarding prudence, the record overwhelmingly discloses GSU had every desired opportunity to present its case from an evidentiary standpoint. It is also clear that GSU was afforded ample opportunity to argue prudence issue and, on several occasions, was permitted to consult with the COMMISSION during the hearing process.
>
> [App. 127a].

The Louisiana Supreme Court made similar determinations, finding Gulf States "had a full opportunity to learn the extent of the case against it and the basis for that case, to present witnesses and introduce documents in support of its position, and to cross-examine Commission witnesses," and to address the decisionmakers. [App. 20a-21a].

4. Prudence disallowance. The Commission's consultants found that Gulf States' initial decision to construct River Bend and its planning process through 1977 were prudent. The company made extensive economic studies of the nuclear option versus alternatives in the early 1970s. These studies indicated that a nuclear generator would provide an efficient source of electric supply. [App. 107a-109a].

In 1977, prior to the beginning of construction of River Bend, Gulf States suspended the project. River Bend remained in suspension until 1979, when the so-called "restart" decision was made and construction of the project was initiated. The consultants found that Gulf States was imprudent in deciding to restart River Bend.

They determined that Gulf States should have cancelled River Bend and constructed a lignite plant, as this option should have appeared much more economical in 1979 than the restart option. [App. 7a-10a; 257a].

Kennedy and Associates determined that Gulf States made no reasonable economic analysis that compared the lifetime cost of River Bend to generation alternatives at the time of the restart decision. This inaction contrasted sharply with the company's reliance on extensive studies in the earlier stages of the project. The consultants performed their own economic analysis, based on facts Gulf States knew or should have known in 1979, and determined that a reasonable planner would have concluded River Bend was uneconomic. In addition, the consultants found that Gulf States used outmoded load forecasting techniques in 1979, which misled the company into believing it could not delay the restart decision. Another Commission consultant, Charles Komanoff, testified that Gulf States should have cancelled River Bend and built a coal plant in 1979, particularly because of adverse cost trends in the nuclear industry and the risk of increased costs relating to the Three Mile Island nuclear accident. [App. 29a-37a].

The company strenuously contended that its only option was to construct River Bend, because it could not find a fuel supply for a lignite plant, could not complete construction of a lignite plant in time to meet rising demand, and needed a nuclear plant for diversity. [App. 165a-166a]. This argument was refuted, however, by Gulf States' own actions. In late 1978, prior to restarting the project, Gulf States made an international effort to sell the plans and contracts associated with River Bend. Had this

effort succeeded, the company would have been dependent on the lignite option. Thus, as the district court found:

> [T]he Court finds GSU's actions inconsistent with its claim nuclear generation was mandated for diversification purposes. In this regard, the record is clear that GSU made a concerted effort to sell [River Bend] both in domestic and foreign markets, without success due to a market glutted with nuclear plants. It is readiiy apparent that, had RB been sold, as GSU so earnestly attempted to do, GSU's sole alternative would have been lignite with no hope of diversification. . . .
>
> [App. 167a].

Gulf States' sales effort reinforced evidence that the company's true motive in restarting the project was to avoid a financial write-off. [*See* App 33a].

The consultants' opinion was reinforced by other evidence. First, Gulf States was the last company to start construction of a nuclear unit anywhere in the country. Second, the nuclear industry effectively rejected the nuclear option as an economic source of energy by the late 1970s; many more units were cancelled than started in the period 1977-79, and only two units were started in 1978 and 1979 combined. River Bend was the *only* unit begun in 1979 or thereafter. Third, Gulf States began construction of River Bend *after* the Three Mile Island nuclear accident, which led many experts to reconsider the safety and expense of nuclear power. In contrast, Gulf States briefly reviewed this traumatic event and assured

itself the accident would not affect River Bend. [App. 32a; 36a].

Kennedy and Associates, the lead consultant, determined that the total damages from Gulf States' imprudence was approximately $2 billion. Mr. Komanoff recommended a disallowance of two-thirds of the cost stream associated with River Bend, or about $2 billion if applied to the company's investment in the project. The Louisiana Attorney General, representing the State, advocated a disallowance well in excess of $2 billion, on the theory that only the sunk costs at the time of the restart and estimated cancellation costs should be recovered. [App. 36a-37a; 45a-46a]. The lead consultants, however, made an analysis of the financial condition of Gulf States and determined that $1.4 billion was the maximum disallowance the company could withstand and remain financially sound. Based on their recommendation, the Commission adopted a $1.4 billion disallowance. [App. 36a-37a].

Gulf States did not argue that the $1.4 billion, once identified by the consultants, should be included in its rate base. Instead, the company proposed an "inventory" plan, in which a portion of the plant's capacity equivalent to the investment excluded from the rate base would become a deregulated asset. The company could sell energy from the deregulated asset, producing revenues to support the excluded investment. This approach would limit the financial write-off required of the company. [App. 37a-38a].

5. **State court appeals.** Gulf States appealed the Commission's decision to the Nineteenth Judicial District

Court, based in part on the argument – raised for the first time – that the Commission's procedure violated due process. The company did not argue, however, that the decision should be reversed and the case remanded for a new hearing. Instead, Gulf States contended that the deference traditionally accorded the Commission's decisions should not be given, and "the Court should evaluate witnesses [sic] credibility and make its own independent determination of the facts and apply appropriate law thereto in resolving the issues on appeal." [App. 104a]. Similarly, in the Louisiana Supreme Court the utility argued that the purported due process violation should be the basis for applying a less deferential standard of review. [App. 13a-14a].

Although the district court ultimately rejected Gulf States' due process argument, it did make a thorough and independent evaluation of the evidence. Rather than relying solely on the Commission record, the district court heard testimony – including new evidence – for about six weeks. In addition, the district court made its own evidentiary findings on the important factual issues.

The district court's findings, which were consistent with the Commission's determination, included the following: a) Gulf States' load forecasting was "faulty" and led the company to "erroneously forecast a premature need from a time standpoint" for new generation; b) the company's contention that lignite was not a feasible option was refuted by its own internal documentation and its "concerted effort to sell [River Bend] both in domestic and foreign markets;" c) Gulf States did not make side-by-side economic studies of generation options at the time of the restart; and d) the utility misestimated

the time necessary to construct River Bend. [App. 165a-168a]. Based on these independent findings, plus an apparent finding that Gulf States misestimated the cost impact of Three Mile Island, the district court found that "reasonable basis exists in the record for the COMMISSION'S finding of imprudence on the part of GSU management in this matter." [App. 168a].

After extensive consideration, including two sessions for oral arguments, the Louisiana Supreme Court upheld the imprudence disallowance. On the due process issue, it found that the Commission's procedure was not faulty, and therefore applied the traditional standard of review. The court found:

> In this case, Gulf States clearly was provided an evidentiary hearing in which it had a full opportunity to learn the extent of the case against it and the basis for that case, to present witnesses and introduce documents in support of its position, and to cross-examine Commission witnesses. . . .
>
> [App. 20a].

Further, the court found the Commission did not abdicate its decisionmaking function. It noted that administrative aides of the Commissioners attended hearings, the Commissioners received written summaries of testimony that were never alleged to be inaccurate, the Commission set aside a full day for oral argument and agreed to receive written exceptions to the report of special counsel, and the Commission members "granted private audiences to company representatives, meetings which would clearly have been inappropriate in an adjudicative proceeding." [App. 21a].

In dissenting opinions, two justices indicated that the majority holding rested in part on Gulf States' waiver of its due process argument in the proceeding before the Commission. One dissenting justice concurred on the due process issue in light of the waiver, while the other contended that acquiescence in the Commission's procedure was not an implied waiver of the company's due process rights. [App. 85a; 88a].

REASONS FOR DENYING THE WRIT

The decision of the Louisiana Supreme Court is consistent with this Court's administrative due process rulings in the regulatory arena. This Court has recognized that a variety of procedures may validly be used in administrative proceedings, and has specifically upheld the combination of investigative and decisionmaking functions, even when the proceedings are adjudicative. In ratemaking proceedings, the Court has determined that due process is satisfied so long as the utility is informed of the issues and has the opportunity to present evidence, and the agency members actually make the decision. Here, Gulf States was informed of all the issues, had every conceivable opportunity to present evidence, and the Commissioners made the decision after receiving extensive presentations from the parties and granting private audiences to the utility.

The petition of Gulf States seeks the creation of new rules of law that would place unnecessary strictures on regulatory agencies. First, despite the Court's consistent

holdings that ratemaking is essentially a legislative function, Gulf States would have the Court announce that it is really adjudicative whenever issues of prudence are involved. Second, the company requests that the Court require a hearing examiner's report whenever advocacy and advisory functions are combined in these proceedings. The new rules sought by the company would not significantly increase the likelihood of correct decisions, but would burden agencies by requiring duplicative recommendations, and would delay the resolution of regulatory proceedings.

Contrary to the claim of Gulf States, this case does not present an issue of great national importance. The large imprudence disallowances relating to nuclear plants have already occurred, and no new plants are being constructed. Thus, a decision now would have little application in the foreseeable future. Moreover, the hearing procedure used by regulators – as opposed to the standards they apply – is not likely to be an important factor in utilities' investment decisions.

In addition, the peculiar posture of this case makes it an inappropriate vehicle for restating the law of administrative procedure. Gulf States may have waived its procedural objections by not raising them before the Commission. Its private sessions with Commissioners undermine its claim that the proceedings were essentially adjudicative. The company's argument in the State courts that the alleged procedural defects should change the standard of review under Louisiana law, rather than lead to a new hearing, raises the issue of what relief properly could be granted by this Court. The district court's decision to permit a new, six-week trial, and to make its own

independent findings, may satisfy any legitimate due process concerns in any event. Therefore, the petition should be denied.

I. THE COMMISSION'S PROCEDURE SATISFIES DUE PROCESS UNDER THIS COURT'S RULINGS, AND NO REASON EXISTS TO ALTER THE LAW IN THE MANNER SUGGESTED BY GULF STATES

This case was an *ex parte* proceeding in which Gulf States sought to increase the electric rates it charges its Louisiana customers. The company filed an application and evidence to support the inclusion of the River Bend investment in the rate base. To examine the evidence and provide advice, the Commission retained expert consultants and attorneys who interviewed the company's management and cross-examined witnesses. The consultants then prepared their recommendations, which were filed into the record and provided to the utility. Gulf States cross-examined the consultants on their recommendations and filed additional evidence in an effort to rebut them.

The consultants were not biased, nor did they have preconceptions regarding the prudence of River Bend, when they were retained to advise the Commission. The hearing was not an adversary proceeding. Rather, the consultants made an investigation, analyzed the evidence, and formed conclusions during the proceeding. These conclusions were filed in the form of testimony so that Gulf States would have the opportunity to learn them, cross-examine the consultants, and rebut the recommendations on the record. This procedure helps to

provide due process by ensuring full notice to the utility and facilitates judicial review by placing the basis for the recommendations in the record.

Nor did the Commission's consultants usurp the decisionmaking function. The Commission was provided with several alternatives: the "inventory" plan proposed by Gulf States, the $1.4 billion disallowance recommended by the consultants, and the disallowance of more than $2 billion proposed by the State. The Commission entertained oral argument on each of these recommendations from their proponents. Moreover, the individual Commissioners granted a number of private audiences to Gulf States to further examine the options. The Commissioners ultimately selected the consultants' recommendation, and adopted the consultants' reasoning in the Majority Opinion, but the decision was made by the Commission.

Additionally, the standard of review in Louisiana provides considerable protection to Gulf States and other utilities. The "arbitrary and capricious" standard is supplemented by the requirement that any decision have *reasonable* support in the record. [App. 26a; 130a]. This standard prevents unreasonable action by the Commission and in effect requires that the Commission's consultants make an evidentiary presentation of their recommendations.

The Commission's procedure fully comports with due process. As this Court has repeatedly decided, ratemaking is a legislative process; the requirements of due process are not as strict in these proceedings as they are in adjudications. Essentially, the utility is entitled to be

informed of the issues and to present evidence, and to have its case decided by the agency members. Even in adjudicative proceedings, the Court has recognized that a variety of procedures satisfy due process, and has held that the combination of investigative and advisory functions is not unconstitutional. The Court's holdings firmly control this case. Gulf States' application – which seeks a radical change in the law – provides no basis for reexamining these decisions.

One change in the law sought by Gulf States is a ruling that ratemaking is adjudicative rather than legislative when it involves issues of prudence. According to the company, the questions in a prudence case require "a determination of who did what, when, where and with what motive," which purportedly are "the hallmarks of an adjudication." [Pet. at 29]. As Gulf States recognizes, the distinction is important because fewer procedural safeguards are necessary in legislative than adjudicative proceedings. [Pet. at 28]. The company is wrong, however, in asserting that the nature of an administrative proceeding is determined by the inquires made in the proceeding.

In *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908), this Court determined that ratemaking is essentially legislative because the effect of any decision is prospective. Justice Holmes' opinion stated that "[t]he establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind. . . ." *Id.* at 226. The Court also held that the factual

inquiries made in the proceeding were not determinative. Justice Holmes stated:

> [I]t does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up. . . .
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> *Id.* at 227.

Prentis was reaffirmed in *New Orleans Public Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989), where the Court determined that a federal district court should have exercised jurisdiction over a utility's claim that federal law preempted a state ratemaking determination. The Court found that the ratemaking decision was "plainly legislative." *Id.* at 371. This ruling controls here, because in *NOPSI* the Council had disallowed costs based on a determination that NOPSI had been negligent – or imprudent – in its power supply planning. The *NOPSI* inquiry necessarily related to "who did what, when, where and with what motive," at least as much as the River Bend inquiry related to these issues. Thus, Gulf States' petition runs counter to a settled principle, recently reaffirmed by this Court.

In addition, in any rate case the Commission must determine historical facts. Establishing an historic test year, adjusting revenues, expenses and rate base in the test year, determining capital costs, examining the legitimacy of expenditures, and other typical procedures all require consideration of who did what, when and where, and whether it was proper. Many involve prudence or closely related issues. Thus, Gulf States' new rule would apply to virtually all ratemaking cases.

The essentials of due process in ratemaking proceedings emerge from the *Morgan* cases, which involved the fixing of rates by the Secretary of Agriculture for stockyard market agencies. In *Morgan v. United States*, 304 U.S. 1 (1938), the Court held that the Secretary's failure to apprise the market agencies of the issues, and permit them a reasonable opportunity to address the issues, violated due process. *Id.* at 19-20. Subsequently, after the proposed order was served on the parties – informing them of the issues – and the parties were allowed to submit evidence on the issues, the Secretary issued a new order, which the Court affirmed. *United States v. Morgan*, 313 U.S. 409 (1941).

The *Morgan* cases are important here because the record was compiled by a hearing examiner, who did not prepare a recommended decision. 304 U.S. at 19; 313 U.S. at 422. Moreover, agency staff members who participated in the hearings prepared the findings reflected in the initial order, and apparently consulted with the Secretary regarding his subsequent order. 304 U.S. at 16-17; *see* 313 U.S. at 422. Yet the Court indicated that these procedures were beyond judicial scrutiny. Indeed, the Court ruled that an inquiry into the process by which the Secretary reached his decision – including the extent of his consultation with the hearing examiner and other staff members – was not a proper basis for judicial inquiry: "[T]he short of the business is that the Secretary should never have been subjected to this examination." 313 U.S. at 422.

The Commission's procedure in this case more than satisfies the requirements emerging from the *Morgan* cases. First, Gulf States not only was informed of the

nature of the inquiry, but the consultants' recommendations were placed in the form of testimony and filed into the record. Second, the utility had every opportunity to make an evidentiary presentation, including the chance to cross-examine the consultants. Third, Gulf States was allowed to formally and informally address the Commissioners, who actually made the prudence decision. Beyond these procedures, the methods employed to reach the decision are not the proper subject of judicial scrutiny.

In addition, *Morgan* refutes the purported procedural defects cited by Gulf States. The Court in *Morgan* did *not* find a hearing examiner's report necessary, and did *not* take exception to the combination of investigative and advisory functions in staff members who aided in preparing the Secretary's decision. Similarly, lower federal courts have ruled that the combination of advocacy and advisory functions does not violate due process. *Wilson & Co. v. United States*, 335 F.2d 788, 796 (7th Cir. 1964); *American Tel. & Tel. Co. v. F.C.C.*, 449 F.2d 439, 454-455 (2d Cir. 1971).

Even in adjudicative proceedings, this Court has recognized that a variety of procedures are used by administrative agencies without offending due process. Specifically, the Court has upheld the combination of executive and decisionmaking functions. In a leading case, *Withrow v. Larkin*, 421 U.S. 35 (1975), the Court rejected the claim that the combination of investigative and adjudicative functions in administrative proceedings

necessarily creates an unconstitutional risk of bias. The Court said:

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.
>
> *Id.* at 47.

In addition, the Court noted that considerable attention had been given in a variety of contexts to "what extent distinctive administrative functions should be performed by the same persons," but noted "[n]o single answer has been reached." *Id.* at 51. After reviewing several different approaches, the Court concluded: "It is not surprising, therefore, to find that '[t]he case law, both federal and state, generally rejects the idea that the combination [of] judging [and] investigating functions is a denial of due process. . . .' " *Id.* at 52, quoting 2 K. Davis, Administrative Law Treatise ¶13.02, p. 175 (1958).

Finally, even if the issues raised by Gulf States were not settled, and needed to be decided for the first time pursuant to the three-part test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), the company's petition would not merit review. First, although the company has a substantial investment in River Bend, its property interest in this case necessarily relates to the *rates* it is allowed to collect

in the future on its investment. A number of courts have indicated that neither consumers nor utilities have a property interest, for due process purposes, in rates for future service. *See, e.g., RR Village Ass'n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1202-03 (2d Cir. 1987); *Miles v. Idaho Power Co.*, 778 P.2d 757, 766-767 (Idaho 1989); *Georgia Power Project v. Georgia Power Co.*, 409 F. Supp. 332, 340-341 (N.D. Ga. 1975); *cf Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 318 (1933) ("No one has the legal right to the maintenance of an existing rate or duty.").

Second, the procedure requested by Gulf States would not significantly increase the likelihood of a correct decision. The examiner's report would only be one additional recommendation to be considered by the Commission. If the report were assigned no special legal weight – which would be the only approach consistent with preserving the elected Commissioners' ratemaking power under the Louisiana Constitution – its preparation would be a mere formality. The Commissioners would have available one more opinion as to the proper outcome, but the opinion would be no more important than any other. Thus, the "due process" inherent in the new procedure would be all form and no substance.

Moreover, the current role of special counsel and consultants is to provide the Commission with an objective and fair analysis of the evidence. Gulf States characterizes these participants as adversarial, but these "adversaries" have produced recommendations in the past thirteen years that resulted in rate increases totalling more than $360 million. The consultants in this case

steered a middle course, recommending a tempered disallowance that preserved the utility's financial integrity. Since the true role of the consultants and counsel is to recommend a reasonable decision, the "objective" appraisal sought by Gulf States is redundant.

Further, the imposition of a requirement that the hearing officer render a decision could change the role of the consultants and counsel, making them real adversaries. Adversarial positions taken by these parties might be tilted in favor of consumers in order to enhance the probability of a fair recommended decision. These positions might become the basis for the examiner's decision, as is often the case in administrative proceedings, or could be adopted by the Commission despite a contrary examiner's report. In this regard, the added procedural formality could ultimately impede an objective decision.

Third, the adoption of the procedure advocated by Gulf States would add a significant burden to the administrative process. The hearing examiner would be required not only to preside over the receipt of evidence, but to perform his own analysis of that evidence and prepare a recommended decision. Contrary to the claim of Gulf States that this process "would not have added a single day to the proceedings," the opinion writing effort likely would require months – especially if it were preceded by a post-hearing briefing period. [*See* Pet. at 25]. Moreover, the process of excepting to the opinion would add another layer of delay to the proceeding. These delays could make it impossible for the Commission to comply with the one-year period for deciding rate applications under Louisiana law. La. Const. Art. 4, § 21(D).

In addition, the procedure would impose an undue administrative burden on the Commission and other regulatory agencies. The requirement to prepare extensive opinions in complex cases would take examiners away from other duties; in Louisiana, where only a few professional rate experts are on the staff, this investment of resources would be very disruptive. Additionally, regulatory agencies might be required to use attorneys as examiners, since legal analyses would be important to the resolution of many complex cases. This requirement would be costly and could impede agencies in devoting resources to litigation. The benefit of an added recommendation does not justify these burdens.

The application of Gulf States seeks the reconsideration of settled principles. No valid reason has been given for changing due process requirements in ratemaking proceedings. Therefore, the application should be denied.

II. THE SPECIAL CIRCUMSTANCES AND HISTORY OF THIS CASE MAKE IT AN INAPPROPRIATE VEHICLE FOR THE RECONSIDERATION OF DUE PROCESS PRINCIPLES.

Although Gulf States paints this case as one of national importance, it actually has little importance, especially with regard to the issue on which the utility seeks certiorari. Although giant prudence questions were dominant in utility cases in the 1980s, they are likely to be rare in the 1990s. Moreover, contrary to the claim of Gulf States, no particular procedure has caused utilities to become more conservative in planning and constructing new generating units. Further, the special circumstances

and history of this case make it an inappropriate vehicle for creating new procedural rules. If the Court wishes to consider changing the law, it should wait for a better case.

As Gulf States appears to concede in its petition, most of the prudence cases relating to nuclear plants have been resolved. [Pet. at 11-14]. Utilities are not planning to construct new nuclear plants and have been cautious in planning new base load units. Units that are being built will probably be needed to meet demand and are not likely to be the subjects of disallowances. Thus, a new procedural requirement in massive prudence cases would have little application in the foreseeable future.

Moreover, to the extent utilities are reluctant to commit massive amounts of capital to the construction of new base load units, the caution results from a variety of factors. Forecasts of demand are uncertain. Alternatives to traditional power plants – such as cogeneration, conservation, efficient appliances, and smaller, lower cost generators – are being developed. The trend toward interregional transmission of power may allow regional capacity excesses to be used in areas where shortages exist, at lower cost than new generators. Certainly "harsh treatment from state regulators during the past decade" may be a factor in the minds of utility planners, but the purported "harsh treatment" came about in a variety of procedural contexts. [Pet. at 13]. It is unlikely that any utility planner is reluctant to construct a new plant because of a particular procedure used in setting rates.

In addition, a decision to review this case would require the resolution of several peculiarities. First, Gulf

States failed to allege a due process violation at any time in the proceeding before the Commission. Invited to supply an objection to the Commission's procedure by a dissenting justice of the Louisiana Supreme Court, the company was able to cite only one statement of its counsel, made at the close of hearings; the statement did not allege that the Commission's procedure violated due process, but that *ex parte* contact between the Commissioners and their counsel would be inappropriate. [App. 85a; Br. of Gulf States in Support of Appl. for Rehearing at 29-30 (Resp. App. 33a-34a); Pet. at 7 n.11].

Without raising the due process issue at the Commission, Gulf States permitted the compilation of a massive record at considerable expense, including testimony from 53 witnesses, hundreds of exhibits, and thousands of pages of transcript. In these circumstances, and especially since the Commission employed its traditional procedure and took special steps to hear the utility's arguments, the due process issue should be deemed waived. *See Beattie v. Roberts*, 436 F.2d 747 (1st Cir. 1971); *cf. Shelley v. Kraemer*, 334 U.S. 1 (1948).

Second, Gulf States sought and received private audiences with the Commissioners, meetings which – in the words of the Louisiana Supreme Court – "would clearly have been inappropriate in an adjudicative proceeding." [App. 21a]. Thus, the company took advantage of the procedural freedom of legislative proceedings, seeking the special consideration attendant to the private plea. It was only after these efforts failed that Gulf States alleged that the proceedings were really adjudicative. This inconsistent and self-serving approach does not present a solid

factual footing for the Court to consider whether the utility was denied due process.

Third, in the Louisiana courts Gulf States did not seek a new hearing. Rather, it contended that the courts should alter the standard for reviewing Commission decisions. [App. 13a-14a; 104a]. In this Court Gulf States does not specify the relief it will seek if the petition is granted. [*See* Pet. at 30]. Obviously, this Court would not be empowered to change Louisiana's substantive law, and could not grant the relief sought in the State courts. Assuming the company would request a new hearing before the Commission, the waiver issue would once again arise. In any event, the uncertain nature of the request for relief makes the case a poor vehicle for the adoption of a new principle.

Fourth, the State district court did grant most or all of the relief requested by Gulf States. In an unusual procedure, since the court sits to review the Commission's ruling, the court conducted six weeks of hearing so that it could hear the evidence firsthand. [App. 102a]. Further, although the district court did not alter the standard of review, it made its own independent findings – all of which supported the Commission – on the major fact issues relating to prudence. [App. 165a-168a]. Thus, the company thus far has had two swipes at the brass ring, though it is entitled only to one. Surely, deciding whether the company should have a third swipe is not the best use of this Court's spare resources.

This is the wrong case to decide whether regulatory procedure should be overhauled. The petition should be denied.

CONCLUSION

Under settled principles announced by this Court, the Commission's procedure complies with due process. The Commission provided Gulf States full notice of the issues, heard all the company's evidence, and took special steps to hear its arguments. Gulf States has offered no valid reason for reconsidering the law of due process here. Indeed, the special circumstances of this case make it a poor vehicle for reconsidering settled principles. Therefore, the petition should be denied.

Respectfully submitted,

ROBERT L. RIEGER, JR.
General Counsel
Louisiana Public Service Commission
Post Office Box 91154
Baton Rouge, Louisiana 70821
Telephone: (504) 342-9888

MICHAEL R. FONTHAM*
PAUL L. ZIMMERING
NOEL J. DARCE
STONE, PIGMAN, WALTHER, WITTMANN & HUTCHINSON
546 Carondelet Street
New Orleans, Louisiana 70130
Telephone: (504) 581-3200

Attorneys for the Louisiana Public Service Commission

*Counsel of Record

APPENDIX TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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EDISON ELECTRIC INSTITUTE LEGAL COMMITTEE SURVEY: ROLE OF COMMISSION STAFF

Members of the Edison Electric Institute Legal Committee were asked to report whether the staffs of utility commissions with which the members were familiar (i) act only in an advisory capacity, (ii) actually participate as advocates in contested commission proceedings, or (iii) act in a dual role, as both advisors and advocates.[1] The results of this informal survey are set forth below. In the few instances where no Legal Committee response was had for a state, direct contact was made with the staff of the commission in that state.

SURVEY RESULTS

1. Alabama	Staff is confined to advising Commission only; prohibited from participating in contested proceedings in an adversarial role. *See Continental Telephone Co. v. Alabama Public Service Commission*, 479 So.2d 1195 (Ala. 1985) (holding that a public staff established by then-Governor Wallace was nothing more than a part of the Commission and could not participate in rate proceeding without violating the due process rights of the utility).

[1] A copy of the letter requesting this information is attached.

2. Alaska	Staff can be either adversarial or advisory in particular cases, but not both. The commission decides which. It most frequently is adversarial.
3. Arizona	Dual role, apparently no limitations.
4. Arkansas	Dual role. Staff is specifically exempted from *ex parte* communication restrictions.
5. California	Staff divided into three distinct areas: advocacy (the Division of Ratepayer Advocates), advisory and compliance, and legal. The DRA advocates the interests of ratepayers in rate proceedings, and apparently does not advise the Commission. The legal division represents the DRA in proceedings before the Commission and represents the Commission itself in proceedings before courts, the legislature, and other agencies.
6. Colorado	Dual role. In the early 1980's however, as a result of increasing concern about "separation of functions," the staff now attempts to separate, on an *ad hoc* basis, its advisory and advocacy functions.

7.	Connecticut	Dual role.
8.	Delaware	Commission staff counsel is advisory. Outside counsel is hired to represent the staff in contested proceedings. The separation between the two functions is not a [sic] complete as this separate staffing suggests.
9.	Florida	Dual role, but staff member who testifies in adversarial proceeding cannot also act as adviser in that matter.
10.	Georgia	Dual role. State Attorney General informally attempts to maintain a "chinese wall" between advisory and advocacy staff, but there exists no formal "separation" requirement.
11.	Hawaii	Advisory only.
12.	Idaho	Dual role, apparently no limitations.
13.	Illinois	Dual role, but staff subject to recently-approved *ex parte* rules where staff member assumes adversarial role.
14.	Indiana	Dual role. By statute, parties are prohibited from making *ex parte* contacts with Commissioners. However, parties are not prohibited from making *ex parte* contacts

	with staff members. Moreover, there are no prohibitions on *ex parte* contacts between the Commission and its staff even where the staff has acted as an advocate in a proceeding. The Commission presently is considering revisions to its procedural rules and the regulated utilities plan to propose limiting dual role of staff. Prior attempts at limiting the staff's dual role, however, were unsuccessful.
15. Iowa	Dual role. The Iowa Utilities Board lends it [sic] staff to the Office of Consumer Advocate, which uses these staff members as witnesses in an adversarial manner. These witnesses usually report to their top advisers who, in turn, advise the Iowa Utilities Board. In a recent case involving the Interstate Power Company, a witness in the case was the very same adviser to the Commission on the very issue on which he gave testimony. The utility objected to this dual role; case was still on appeal at the time of this survey.
16. Kansas	Dual role.

17.	Kentucky	Advisory role only.
18.	Louisiana	Dual role, however Commission's electric staff is very small; Commission frequently hires outside counsel and consultants who advise and participate in adversarial proceedings.
19.	Maine	Dual role, but under the Maine Administrative Procedures Act, an advocate staff member may not have any *ex parte* contact with a commissioner about any non-procedural issue involved in the case. But the *ex parte* rule does not prohibit staff members from serving advocacy and advisory roles in different cases with the same or similar issues.
20.	Maryland	Dual role. Apparently there exists no *ex parte* rule.
21.	Massachusetts	No statutes govern role of staff. Under internal Commission procedures, no staff enters an appearance or otherwise appears as a party. Instead, one or more staff member [sic] join their fellow staff member, who has been designated as that case's "Hearing Officer," at the bench. On occasion, commissioners will join the Hearing Officer and staff at

	the bench. These bench participants question witnesses, make discovery requests, and join with the Hearing Officer in offering selected replies to requests as "bench" exhibits. Various utilities have objected to this arrangement without success.
22. Michigan	Dual role, no formal rules prohibiting dual role. Typically, if a staff member testifies in a case, he will not argue his position informally to the Commission but may provide technical advice.
23. Minnesota	Dual role, but separate departments. Prior to 1980 the regulatory agency consisted of two divisions: (1) the Commission and its staff, which heard and decided cases, and (2) the participating department staff, which played an advocate's role in representing consumers' interests. While members of the two staff divisions played different roles, there was close communication between them. In 1980, the two divisions were segregated into separate agencies, (1) the PUC and its staff, and (2) the Department of Public Service, which represents consumers' interests.

		These two agencies are separately managed and are independent of one another.
24.	Mississippi	Dual role.
25.	Missouri	Dual role, but staff subject to *ex parte* rules in pending, contested cases.
26.	Montana	Dual role, but supposedly acts only in advisory capacity when consumer counsel intervenes in rate cases.
27.	Nebraska	Dual role, but recently efforts have been made to keep the functions separate. [No investor owned electric utilities serve in Nebraska, so there is no regulation of them].
28.	Nevada	Separate staffs serve the separate functions.
29.	New Hampshire	Dual role, but staff members that act in advisory capacity ("decisional employees") are subject to *ex parte* rules. *See* NH Admin. Rules, Puc 203.15, *Participation by Staff.*
30.	New Jersey	Dual role. No statutory prohibition, but the commission has indicated that staff members who participate as advocates cannot participate in the decision.

31.	New Mexico	Advocacy only, in practice, but no statute prohibits staff from acting in advisory capacity.
32.	New York	Dual role. Purportedly, those who advise Commission are "senior staff" members, *i.e.*, heads of different offices and their deputies, whereas the "advocacy staff" is compromised [sic] of different staff members whose positions supposedly are independent of the views of senior staffers. But there exists no formal "separation" requirement.
33.	North Carolina	Advisory role only; no active participation in contested proceedings. Separate "Public Staff" performs adversarial role.
34.	North Dakota	Dual role.
35.	Ohio	Dual role.
36.	Oklahoma	Dual role.
37.	Oregon	Dual role.
38.	Pennsylvania	Dual role. Staff is separated into the Law Bureau and the Office of Trial Staff. Law Bureau prosecutes all non-rate matters and advises in all matters. The Office of Trial Staff prosecutes all rate matters. Staff subject to *ex parte* rules.

39.	Rhode Island	Commission has no staff other than its own counsel, which drafts decisions. There is also a Division of Public Utilities & Carriers. The Chairman of the Commission is the administrator and chief executive officer of the Division. The Division has its own staff which participates in contested proceedings and plays an advisory role in the decision-making process. In some cases, a member of the Division's staff may serve as staff to the Commission. When this occurs, that staff person does not work with the Division on that case. All parties to a proceeding are subject to *ex parte* rules, including the Division. The Supreme Court of Rhode Island has recognized, however, that a "somewhat incongruous situation" may arise when the Division administrator, despite his capacity as chairman of the Commission, seeks review of a Commission decision. *See Providence Gas Co. v. Burke*, 419 A.2d 263 (R.I. 1980) (setting forth the allocation of functions among the Division, the Commission,

		and the Attorney General in challenges to Commission decisions).
40.	South Carolina	Dual role, but staff's primary role is as adviser to Commission.
41.	South Dakota	Dual role.
42.	Tennessee	Dual Role. Under Tennessee's Uniform Administrative Procedures Act, staff member cannot advise Commission upon matters in which he testifies.
43.	Texas	Dual role, however section 17 of the Administrative Procedure and Texas Register Act prohibits *ex parte* communication by staff members functioning in an adversarial role.
44.	Utah	Advisory only.
45.	Vermont	Advisory only. Prior to 1979, the Vermont Public Service Board was the single regulatory body and its staff served as both advocate and advisor. In 1979, however, the Board was reconstituted into two agencies: the Department of Public Service and the Public Service Board. The Department of Public Service serves as the consumer advocate, while the Public Service Board adjudicates cases.

46.	Virginia	Dual role.
47.	Washington	Dual role, no formal "separation" requirement.
48.	West Virginia	Dual role, but staff members who testify in a given case cannot advise Commission on that case.
49.	Wisconsin	Staff is limited, by statute, to the role of acting as investigators and advisors to the Commission. *See* 15 Wisc. Admin. Code § PSC 2.32(4) ("members of the Commission staff appear neither in support of nor in opposition to any cause, but solely to discover and present, if necessary, facts pertinent to the issues"). In their role of factfinders, staff members do actively participate in contested proceedings and may, in practice, take an essentially adversarial position or act as advocates of a particular position.
50.	Wyoming	Dual role.

Evans B. Brasfield
Charles H. Carrathers, III
Hunton & Williams
4/24/89

AUG 04 1989

HUNTON & WILLIAMS
707 EAST MAIN STREET P.O. BOX 1535
RICHMOND, VIRGINIA 23212
TELEPHONE 804-788-8200
TELEX 684-4251

[BRANCH OFFICE ADDRESSES DELETED]

DECEMBER 6, 1988

Robert L. Baum, Esquire
Edison Electric Institute
1111 19th Street, N.W.
Washington, DC 10036

Dear Bob:

I will be grateful if you will circulate this inquiry to members of the EEI Legal Committee.

In some states (such as North Carolina) the Staff of the Utilities Commission is confined to the role of acting as advisers to the Commission, and Staff members do not actively participate in contested proceedings (although there may be a separate "public staff" which assumes that adversarial role). In other states, such as Virginia, the Staff does both: it actively advocates particular positions in the adversarial proceedings, and then it acts as confidential advisers to the Commission. I have been asked to determine what the situation is in other states, and I will be grateful if members of the Legal Committee would advise me whether the Staff in their state is limited to an advisory role, as in North Carolina, or acts both as

adviser and advocate, as in Virginia. If neither description fits the Staff's activities in a particular state, I would appreciate being told what those activities are.

Thanks very much for your help.

Sincerely,

/s/ Evans
Evans B. Brasfield

EBB/mn

Transcript of oral argument November 10, 1987.

[Typographical mistakes in original].

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* * *

those matters where I disagree with Mr. Uddo rather than simply stand by and let him –

COMMISSIONER LAMBERT: Tom, I understand that, but I mean by making your presentation you obviously differentiate from his.

MR. PHILLIPS: Yes.

COMMISSIONER LAMBERT: And, you know, we have access to the transcripts so we can make that determination ourselves. And that's the point I'm making.

MR. PHILLIPS: Let me suggest this.

COMMISSIONER ACKEL: Well, right now this is a rutterless ship . . .

COMMISSIONER LAMBERT: It is.

COMMISSIONER ACKEL: . . . and I want to take command, starting from here on we're not going to have any – let's try to keep the names out so no one will want to rebut, I'd like for you, Mr. Phillips, to rap up . . .

MR. PHILLIPS: I will rap up.

COMMISSIONER ACKEL: . . . when you can, and we'll let Mr. Uddo have his 2 minutes.

MR. PHILLIPS: I would make this request of the Commission, I think it's appropriate. We will – if the Commission and Mr. Edwards – I would address this to

Mr. Edwards as Hearing Examiner – we would appreciate the opportunity within 10 days to file a written response to Mr. Uddo's report, and that way all of what I am attempting to point out to you now can, we will file exceptions to his report. Is that appropriate?

COMMISSIONER LAMBERT: We have no problems with that.

COMMISSIONER ACKEL: No objection. And we don't want to take away from the time that you're supposed to have to present your case.

MR. PHILLIPS: Well, I don't want to burden the Commission with words that you're not listening to. Just don't want to do that. I know when . . .

COMMISSIONER ACKEL: Well, it may necessitate another meeting because it's late in the day now.

MR. PHILLIPS: It very well may. And if the Commission – this is a matter of sufficient – let me tell you, this is so important to the survival of my client, and it's important to the ratepayers of this state, that we are available and will be here to provide you any information that we can at any time.

COMMISSIONER ACKEL: I want you to rap up though.

MR. PHILLIPS: I'll wrap it up.

COMMISSIONER ACKEL: I don't feel like we're rushing you other than on a relevant matter.

MR. PHILLIPS: Only thing I will tell you, and I will move along and say this. We have taken significant

issue with the lignite alternative that is suggested by Mr. Falkenberg. We first have, we think the record clearly demonstrates it could not have been built in the time frame involved. Secondly, we suggest in the '78 analysis, any reasonable '78 analysis, with what was known then would result in nuclear being the favorite option. The Commission's witnesses suggested that lignite cost for their plant that they suggested was an alternative, was something like 47 cents per million BTU for the lignite. He drew that from 3 Texas utilities plants that were first generations good lignite, much better than was available anywhere else. The testimony then at a later hearing, the Commission brought another expert in to – we challenged the price, they brought an expert in from Washington, that expert said, well the price really is closer to – the lignite price appropriate would be closer to 70 cents to a dollar. In a range of 70 cents to a dollar, which was just about what Gulf States analysis had been at the same time. With the 70 taking the analysis that the witness had, the exact same analysis that the witness had, and I'm through with charts, one more chart. The exact analysis that the witness had, our witness took that Monte Carlo analysis, that's all on a computer program. They gave us the disc. We ran the – we got to use that disc. We changed one thing. We changed the assumption of fuel from the one that was used by the staff witness to the one that the second staff witness says was correct. By cranking then the 70 to a dollar we came out with the result with his program, his analysis, of 11 million dollars per year, favoring nuclear over his mythocal lignite plant. Just that one calculation. Now, that is the quality, that is the type of information that is in this record for the purpose of

condeming my company, and the investors in that company have a billion 4 of investment in a plant that's operating and will provide service for these rate of this state. We're available to discuss this with you, we will do what we can to educate you about what our position is if we can. Yes, sir.

COMMISSIONER ACKEL: Earlier, you said, you did not want to see if you believed, we believed that there was a million 4, a billion 4, of disallowance that you did not want to – you would hate to see a rule that it was imprudent. But, I thought you were about to suggest another way.

MR. PHILLIPS: What I would say, and let me get to this right now. What I said . . .

COMMISSIONER ACKEL: How would you treat the million – billion 4?

MR. PHILLIPS: What I said was, that a billion 4, that an imprudence disallowance is not justified. That is not justified.

COMMISSIONER ACKEL: But you also said Mr. Phillips . . .

MR. PHILLIPS: My second point was, I said that the imprudence allowance was not necessary to be found in order to ameliorate the impact of the rates. Because a billion 4 disallowance does not alter the rate impact all that all of that much. Now justified, and it does not translate into rate, there are other ways to do it. We have done it through a phase-in plan. It can further be argumented by an inventory proposal or other ways which do not condemn the company who is guilty of

something that it is not, and at the same time protect the ratepayers.

COMMISSIONER ACKEL: It sounds like you've shuttered to be called guilty, and I'm just wondering if there's a voluntary hit that you are suggesting. I couldn't help but believe that maybe you are saying that there would be another way to get to that number other than calling it imprudent.

MR. PHILLIPS: I don't think that the billion 4 – I think – I look at the basic rates. I think that the recommendation of the staff for the first year is low. I do not expect the Commission to give us what we asked for. I suspect and hope that somewhere in between, for the first year increase, there will be an amount which will keep us financially viable, will not kill the ratepayer. At the same time, that can be accomplished without there being an imprudence hit. It can be done by divising a phase-in plan, by constructing an inventory proposal or doing other things. The staff experts are imaginative people, our people, Mr. Uddo, is an imaginative person in his group. We would be pleased to (unintelligible).

COMMISSIONER LAMBERT: Well, Mr. Phillips, let me ask you this though.

MR. PHILLIPS: Yes.

COMMISSIONER LAMBERT: But if a portion of the investment has been found to be imprudent, we would be shirking from our duty and our responsibility if we permitted you to earn a rate of return on an investment that was deemed by some, some experts and if we decided to accept the wisdom of some of the experts that

would say that, we would then, if we turned our head to that, we would then be authorizing you to earn on an imprudent investment. It could be argued. It seems to me what you're suggesting is absolutely nothing. It seems to me what you're suggesting is that we disallow nothing, and leave you in a position where you can go into court and say you have a 4.3 billion dollar investment, and we did not permit you to earn on it, and the court would come in and say well, we're going to let them earn 14% on that investment, which would translate into about 600 million dollars in rate increases. I mean that's the trap that we would fall into.

MR. PHILLIPS: I am not proposing a trap.

COMMISSIONER LAMBERT: I'm just telling you the real – what would happen.

MR. PHILLIPS: What I am suggesting to this Commission, what I am suggesting to you is that the prudence hit is not justified by the record. I'm telling you that. I am also telling you that the impact of the rates from the investment in River Bend cannot be visited on the ratepayers in our service area in a single rate increase, it has to be phased-in if all of the investment is recognized, which we suggest it could be.

MR. LAMBERT: Tom, you've danced around all day, and waltzed around, and you've done a good job of it, but you have not suggested that the company sell some assets. That the company pear down. Do like a lot of companies do, they're selling real estate and they are putting it against debt to reduce their overall debt. I mean the federal governments getting ready to do that. Reagan's proposing to sell some state and some federal

lands, and I wouldn't be surprised if the new Governor doesn't propose to sell something here to – I mean, all kinds of innovative and approaches are being required that in the past no one has had to do, but everybody in the whole country, in the world is doing it now. But, you . . .

MR. PHILLIPS: We have done it.

COMMISSIONER LAMBERT: . . . but you've danced around that. And I've asked you that over and over, and you don't . . .

MR. PHILLIPS: We have told you. We – in the context of the interim case. You had your plan. And your plan involved . . .

COMMISSIONER LAMBERT: 10 things. Let me just . . .

MR. PHILLIPS: We have sold.

COMMISSIONER LAMBERT: Wait just a second. I know that. And Donnelly said my plan was the product of somebody that didn't know what they were doing.

MR. PHILLIPS: Uh-uh.

COMMISSIONER LAMBERT: Oh, yes he did, I remember. He said it was unworkable, and you've executed 8 of those things already. I mean you've complied with 8 of the requirements, but you haven't really gotten to the – what I'm saying is you might have to take 5% of your company and determine what portion of that – find non-producing assets, and reduce the size of your company, and put that against your debt to help solve this

problem. It's not just a solution that can be found by going directly, by raising rates. But you're not really showing that. And I think you're reaching a point where you're going to have to.

MR. PHILLIPS: We don't have anything. We have lignite we're trying to sell. It's on the market and it's being advertised. But what Mr. Donnelly suggested to you was in the context of the time, of the time when we had to have the money, we could not get out and promote sales. We have orderly disposed of assets. We have borrowed, we have pledged our accounts receivable, which was one of the plans.

COMMISSIONER LAMBERT: That's right.

COMMISSIONER POWELL: Where is that lignite?

MR. PHILLIPS: The lignite is in Central Texas. Gulf States had 2 lignite reserves. They had them at the time – we bought them in the mid 70's. About '76 or '77. We had the lignite reserves there at the time we were making analysis of what we were going to do. The lignite – there were 2 of them. We sold one of the lignite reserves about 1981, and this Commission – we made a profit on it, and this Commission, as I remember, flowed that through to reduce the rate base – flowed it through to the ratepayers. Or, reduced – it reduced something else.

COMMISSIONER LAMBERT: Tom, what I'm trying to say to you, is . . .

MR. PHILLIPS: We've got nothing to sell, that is our problem.

COMMISSIONER LAMBERT: You really – any company does. Just about any company – you can take a bank, you can take anything. You know, and you can look at it and go through all of your costs, and go through a list – do an inventory of all your immovables, your movables, look, I think that's what the new governor elect is going to do. He's going to inventory all state leases, lands, everything. And, you know, I've heard him say that, and obviously Reagan's doing that, and I'm suggesting that's what you ought to do.

MR. PHILLIPS: Well, here is our problem. The assets that we have are sighted in our service area. The assets produce electricity. The persons who buy our assets are our customers. When they buy the asset that produces the electricity, then they get off of our system and we lose the revenue.

COMMISSIONER LAMBERT: How much is your lear jet valued at?

MR. PHILLIPS: I don't know what the lear jet's valued at. It's been depreciated, they've used it for several years.

COMMISSIONER LAMBERT: Well, I mean, I'm talking about no frill.

MR. PHILLIPS: They don't want it. They lease it, so they pay something for it.

COMMISSIONER LAMBERT: I mean what I'm saying – but, we're into a no frill mode now. I mean, that's what we're trying to say to you now. I mean, that's what we're trying to say to you, that's . . .

COMMISSIONER ACKEL: All right, let's wrap up. Are you through?

MR. PHILLIPS: I am, I believe that I'm through with this presentation and I believe that, I think that the Commission will respond to what I've said and that my client is not through.

COMMISSIONER ACKEL: Okay, Mr. Uddo?

MR. UDDO: Just one point to make. Mr. Phillips has brought up points about testimony that was presented by Mr. Richardson with regard to the 7 years it took to construct the lignite plant. Mr. Phillips doesn't tell you is that on 2 different documents, which were presented to all of the GSU lignite witnesses, each one of these people I took them through point by point and identified at least 4 or 5 lignite units which were in the planning process for GSU that was scheduled to be completed in less than 6 years. We never said 4 years, we never said 5 years. The cut off date that we have we used was 6 years, and also we had a joke, a constant joke going through this entire thing about the dueling consultants. But we brought in a consultant who was an expert in the field and was doing this type of thing during the time that this consideration came about and that expert said that it could be done in 6 years. I rest.

COMMISSIONER ACKEL: Okay. Are you satisfied now, Mr. . . .

MR. PHILLIPS: I'm not satisfied, because I have . . .

COMMISSIONER LAMBERT: But you have 10 days.

MR. PHILLIPS: Yes, I have 10 days.

COMMISSIONER ACKEL: Would you like to respond to his rebuttal?

MR. PHILLIPS: I would simply respond that as I pointed out we had 2 – we had some computer model runs which did project the construction, the in-service date of lignite plants either 5 or 6 years. What was it?

UNIDENTIFIED VOICE: 6 years.

MR. PHILLIPS: 6 years. We had that. We admitted that.

UNIDENTIFIED VOICE: 5 years.

MR. PHILLIPS: 5 years. We also – the point of this is that these were used for a comparitive economic study. There's no question they were in our record. But also, also, and this was stated by Mr. Richardson. He said that this did not represent, those things did not represent a definitive plan to replace nuclear with lignite. It was an economic analysis that was run through the computer model as many things were. He pointed out to the record and to Mr. Uddo and to everybody, that our real studies were those that we introduced to stay, which said 7 and a half years. We also showed that the Northern States Power, which was the one that was relied upon by the staff witness, said 8 and a half years in their report. And another report that he referred to, did not – Northern States was not even building the plant, it was just participating in it. And it just showed the time when he would be participating. And we have those two reports in the record, and we can point them out to you, and I'm right. Thank you.

MR. UDDO: First of all, we never said it was a definitive basis for making a decision, and second of all, this portion of the case is not as important as Mr. Phillips is trying to make it, and I don't even think we referred to it in the terms that he's stating in the special counsel report, not worth arguing about anymore.

COMMISSIONER ACKEL: Who's the next witness? Attorney General's office.

MR. MCNEILL: Well, if it would please the Commission, we've gotten past 5 o'clock and . . .

COMMISSIONER ACKEL: This will be the conclusion of our meeting, after the Attorney General's statement.

MR. MCNEILL: And, I'm sorry Mr. Owen and Mr. Schwegmann cannot be available, and I would hope that we can communicate to them what transpired in their absence. I'll try to be brief as I said earlier. By now you've not only read your counsel's report, but you've heard this discussions by your counsel, by Mr. Phillips. But I think we should be very clear about what we're talking about here. There's a lot of options that this Commission has, a lot of ways you can slice it up. The one thing . . .

COMMISSIONER ACKEL: Wait a minute, sir. Let me have your attention please. I think I now have it. Those of you who want to leave, please do so quietly, those of you who want to stay please be seated. Go ahead.

MR. MCNEILL: Thank you. At the outset, I think what we ought to clearly understand is, that while

Mr. Phillips guarantees us he will be back next year, what you are deciding, either explicitly or by implication is the value of the asset for ratemaking purposes. Now, once that value is determined there is a lot of things you can do with it

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year, then we defer some of that and borrow the money and pay it back at whatever rate of return that this Commission authorizes, some 12% or so interest. But that money – once you decide that this is the amount, then you're going to have to wrestle with that monster sooner or later. Whether it be six months from now, or a year from now, or every year for the next five years or six years. Whether you keep a particular phase-in schedule or not, once you decide that this is the value of the asset for ratemaking purposes, if you come back and try to take it away somewhere down the line, Mr. Phillips is going to be in court saying, you're denying me a due process of law and you're confiscating my profit. So, I think you're going to have to face this issue now as to how much, if anything, of this asset should go under rate base. Now, if you go along with special counsel's recommendation on the phase-in, you're talking about a 25% increase on your thousand kilowatt per hour customer based on the comparison of the average rates. Now, we think these disasterous consequences will be even worse, which appears certain to us if Gulf States suffers a decline in sales when their prices go up. We think that's going to happen, and

we think it's just going to exacerbate this problem. And all of this is for assets, which by and large were imprudently conceived and constructed, and which we think there's no need for, and may never be a need for. And we urge you not to do it. Thank you, Gentlemen, I'll be glad to answer any questions you may have.

COMMISSIONER ACKEL: Mr. Uddo?

MR. UDDO: The question I have is not with regard to Mr. McNeill. One question that I do have before we adjourn. Commissioner Schwegmann has sent the message to me through Mrs. Porter that he wants us to prepare a report or a memo with regard to this inventory thing that we keep hearing abut. Mr. Phillips touched on it and Mr. McNeill aptly pointed out that we're not really sure what this is all about. And my question is, is there something that we should be looking into? Is there a proposal by Gulf States to the Commission that should be investigated, and if so, I think it should be layed out a little bit clearer, especially now since we've been requested to do a report on it.

COMMISSIONER ACKEL: Well, I heard a lot today about selling of assets. I don't know what assets they have that are saleable, I heard Mr. Phillips say he had some lignite fields in Texas, had one that he sold. Certainly, before you can talk about selling assets you need to identify. And I imagine there must be a value placed on them to see whether or not a significant value of money can be raised in order to alleviate the problem.

MR. UDDO: I think, Mr. Commissioner, I think - I understand what you're saying, but I think what Mr. Phillips is referring to was in some way, and correct me if

I'm wrong Mr. Phillips, because I'm only hearing this for the first time today. Instead of an imprudence disallowance, taking the capacity or taking the asset of River Bend, and deferring it for past the phase-in, I really am not sure what it is, and I just need some varification there.

MR. PHILLIPS: It was, I think as I remember, Mr. Uddo, it was mentioned during the course of the proceedings. I don't think anybody made a proposal, but this Commission has wrestled with the problem of Grand Gulf, with respect of the inventory where you take a certain element of the capacity of a unit not included in rate base, and it is set aside either in a new subsidy area, or held by the company. And the power will be sold to third parties and under certain conditions can be sold to the power pool. That is a typical and accepted approach in area in a situation where you want to lessen the impact of the inclusion of investment in rate base. It keeps the ratepayers the current ratepayers from being burdened, and at the same time it doesn't destroy the investment from the standpoint of imprudence, and we do suggest that . . .

COMMISSIONER LAMBERT: Could I ask this question?

MR. PHILLIPS: Yes.

COMMISSIONER LAMBERT: Does it just hang around for a number of years and then sometime the utility rolls it out?

MR. PHILLIPS: Until the conditions that are (unintelligible)

COMMISSIONER LAMBERT: And now we want to raise the rates some more to cover this additional investment? What you're saying is . . .

MR. PHILLIPS: It has conditions. The inventory plan would have conditions by which the capacity is in inventory, and has conditions by which it would come out of inventory. And that's the term, that unlike Mr. McNeill's apprehension, as he stated his apprehension, it is a matter that represents the will of the Commission.

COMMISSIONER LAMBERT: Mr. Uddo, why don't you look into it. Just look into it, but bare in mind that that's a – sounds like a very grave departure from the norm, so bare that in mind.

MR. UDDO: Quite honestly, it's the first time I'm hearing abut it, and I asked the question because I wanted some guidance from the Commission. And I would ask, I asked that Mr. Phillips maybe submit to me in writing what the proposal is. Because right now I really, I don't know what I'm supposed to look into. You give me a plan, and I'll be glad to look at it and, you know, we'll get it together as quickly as possible.

COMMISSIONER POWELL: Well, that's what I say, why don't you get . . .

MR. PHILLIPS: We will. We'll talk to him, and further explain what we're suggesting and of course the conditions of any such programs are at the discretion of the Commission. But what we had suggested, that this is the method which has been used, it didn't originate with me, and this Commission didn't, or spoke of it in the Grand Gulf matter. I don't know how it was finally

resolved, but it was routed about and discussed by this Commission. But we will do that, and we will file our acception to the report.

COMMISSIONER LAMBERT: Everybody has 10 days.

MR. PHILLIPS: Thank you, very much.

COMMISSIONER ACKEL: This meeting is adjourned.

I hereby certify that the foregoing pages 1 through 190 are true and correct to the best of my knowledge of the hearing held at Baton Rouge, Louisiana, on November 11, 1987.

/s/ Wendy H. Loyd
Wendy H. Loyd, Reporter
Louisiana Public Service
Commission

Transcript of hearing October 6, 1987.

[Typographical mistakes in original].

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MR. EDWARDS:

Mr. Phillips.

MR. PHILLIPS:

I have a little something else to say. First, I take note of Mr. Uddo's pronouncement that he is not now an adversary and has become an impartial participant in the proceedings endued with the public responsibility to be fair and reasonable and objective in all respects. I might say that I had heretofore looked upon Mr. Uddo as something what of an adversary because he has acted like one and he has talked like one and at times has looked like one. But, in any event, whatever role Mr. Uddo wishes to assume, we are obliged to accept, I guess. The only thing I will say, and I wish the record to be clear on, that whatever role Mr. Uddo has, whether as adversary or participant in the process, I would suggest that any contact that he has directly with the parties who decide this case on an ex parte basis would be inappropriate and would have the affect of denying my client due process of the law. And, under the Administrative Procedures Act to the extent it may be applicable and under the general provisions, which I think accord my client the right to procedural due process. That is my statement. Now, with respect to this program that we are launching on for filing reports and this sort of thing, that's – so long as the documents are filed and we have an opportunity to

review and except to them or accept them, then we would interpose an objection. It is our view that we should – it is my position that, as I stated, we will file a brief and it will be just that which we will ask that be read by whoever has interest. Hearing Examiner, I have always – whatever your status is I consider you the Judge of this proceeding and I am going to let you have one to read it if you wish, and the Commission. But, we also wish to have time to file the exception to the special report. We are – I find myself in a position where – well, I am in a position where I would like to go ahead and proceed with the disposition of

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Gulf States Utilities Company's Brief in Support of Its Application for Rehearing (No. 88-CA-0709, No. 90-CA-0445, Supreme Court of Louisiana) (May 21, 1991)

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States says is that due process requires that these Commissioners be assisted in their review of the evidence by a report from an objective person, a hearing examiner who has actually observed the presentation of all evidence, rather than by witnesses representing just one of the two vigorously-disputed and diametrically-opposed viewpoints presented in the hearing.

J. **No Acquiescence**

Contrary to the contentions of the Commission, and to the conclusions apparently drawn by some Members of the Court, Gulf States has never acquiesced in any of the Commission errors about which it is now complaining. Gulf States has repeatedly complained to the Commission about the nature of its proceedings. In this very case, after the filing of the Special Report of Counsel, Gulf States' counsel explicitly objected:

> I have a little something else to say. First, I take note of Mr. Uddo's pronouncement that he is not now an adversary and has become an impartial participant in the proceedings endued [sic] with the public responsibility to be fair and reasonable and objective in all respects. I might say that I have heretofore looked upon Mr. Uddo as something [sic] what of an adversary because he has acted like one and he has talked like one and at times has looked like one. But, in any event, *whatever role Mr. Uddo wishes to assume, we are obliged to accept, I guess.*

> The only thing I will say, and I wish the record to be clear on, that whatever role Mr. Uddo has, whether as adversary or participant in the process, I would suggest that any contact that he has directly with the parties who decide this case on an ex parte basis would be inappropriate and would have the affect [sic] of denying my client due process of the law. And, under the Administrative Procedures Act to the extent it may be applicable and under the general provisions, which I think accord my client the right to procedural due process. That is my statement. [LPSC Tr. U-17282, 10/6/87 P.M.]

The Commission has apparently succeeded in convincing the Court's majority to treat the Company's compelled compliance with its procedures, procedures which the Company had repeatedly challenged, as some sort of waiver of its right to object. Gulf States' due process argument should be reconsidered on the merits, without the spurious distraction of the waiver issue.

III. PRUDENCE

A. Gulf States Prudence

Gulf States respectfully submits that the Court's majority opinion commits legal error in its construction of the prudence standard. The Court must be mindful that the legal standard for prudence is not whether the LPSC's witnesses' economic study or planning procedure is more persuasive than that of Gulf States' witnesses. The correct standard is whether *any* reasonable utility planner, faced with the same external circumstances, federal energy enact-

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